Nos. 77-1575, 77-1648 and 77-1662

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

MIDWEST VIDEO CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

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1. Respondent Midwest Video Corporation, in contending that the Commission lacks statutory jurisdiction to promulgate the channel capacity, access and equipment availability rules under review (Resp. Br. 22-46), does not dispute that these rules are designed to promote the long recognized statutory objectives of increasing programming choices for the public and the number of outlets for community expression.[1] Nor does it dispute that *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) ("Midwest Video I"), held that the Commission's jurisdiction over cable television, which is grounded in the broad jurisdictional grant of Section 2(a) of the Communications Act of 1934, 47 U.S.C. 152(a), extends at least to rules designed to further those

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[1]Amici Teleprompter Corporation, *et al.* take essentially the same position as respondent Midwest. Unless otherwise indicated, our discussion here applies to the arguments of both respondent and amici.

objectives. Respondent nevertheless advances two arguments in support of its contention that the Commission lacks jurisdiction. Neither argument supports its conclusion.

a. First, respondent contends that while these rules may be designed to further the statutory objectives discussed in *Midwest Video I*, they are beyond the Commission's jurisdiction because they contravene another statutory policy—namely "the preservation of values of private journalism and editorial control" (Resp. Br. 31). The rules contravene that policy, respondent asserts, because they "substantially impair the cable system's editorial control in the selection and presentation of programming it delivers to its subscribers" (Resp. Br. 25; see generally Resp. Br. 25-33).

Assuming respondent's premises—that preservation of journalistic discretion is a pertinent statutory policy in the context of cable television and that the rules here significantly impair that discretion—the principal flaw in respondent's argument is that it goes not to the Commission's jurisdiction but to the wisdom of the rules and the correctness of the Commission's judgment concerning the rules' impact on, or contribution to, various statutory policies and the public interest generally. When a statute contains several policies and objectives and authorizes an administrative agency to promulgate rules in furtherance of them, it is the function of the agency to determine whether the rules will promote those objectives. And to the extent there may be a tension among different statutory policies, it is the agency's function to weigh the various interests that will be affected. The function of courts in reviewing the kind of rules promulgated here is to determine whether the agency's assessment reflects "a rational weighing of competing policies" and is "based on consideration of the relevant factors." *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978). As this Court

stated in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943), "[i]t is not for us to say that 'the public interest' will [in fact] be furthered or retarded by the * * * [regulation]." See also *Midwest Video I*, *supra*, 406 U.S. at 674-675.

The fact that rules which promote certain statutory objectives may have an impact on other statutory objectives does not, however, mean that an agency is without jurisdiction to weigh the interests and promulgate the rules. That should be particularly evident with respect to the statutory policy on which respondent relies—"the preservation of values of private journalism and editorial control." Many rules promulgated by the Commission—whether they apply to broadcasters or cable systems—could be viewed in some degree as curtailing journalistic discretion; *i.e.*, discretion to operate in a way prohibited by the rules. The fairness doctrine, the personal attack rule, and the mandatory origination rule upheld in *Midwest Video I* are only a few examples. That those rules may have an impact on "values of private journalism and editorial control" does not deprive the Commission of the statutory authority to enact them.

If respondent's "jurisdictional" argument is viewed merely as an attack on the rationality of the rules under appropriate standards of judicial review, it should be rejected.[2] The Commission's assessment of the various statutory policies and its judgment that the rules will further those policies and the public interest were rational and based on a consideration of the relevant factors.

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[2]As noted in our opening brief (page 15 n.16), the court of appeals expressly did not decide whether, under appropriate standards of judicial review, the Commission's rules should be set aside as arbitrary or capricious (App. 91), although the opinion makes clear the court's view that the rules are unwise and indicates that the court's statutory jurisdiction holding, like respondent's argument, was based largely on that view. See App. 42-53 and our opening brief at 31-32.

Respondent is incorrect in claiming that the impact of the rules on "private journalism" and "editorial control" are so great as clearly to outweigh the objectives the rules are designed to promote. As we show in our opening brief (pages 10-13, 37-40), the rules impose a limited burden on cable systems that is content-neutral and that has little, if anything, to do with journalistic discretion. They do not require any system to displace existing broadcast retransmission or pay programming services. While the rules may require a system to reserve one of its activated channels[3] for access services and prevent it from using that channel for programming that it might otherwise desire to present, that requirement does not affect "private journalism" or "editorial control" in any substantial or meaningful sense. Indeed the rules affect those interests even less than the fairness doctrine or the mandatory origination rule, since they do not relate to the programming presented by the system operator.[4] Although the Commission carefully considered the burdens that the rules would impose on cable systems (App. 131-161)—and substantially modified its original, 1972, access requirements to mitigate the burdens—it reasonably concluded that, in light of all of the relevant statutory policies, the benefits of the 1976 rules outweigh their costs.

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[3]For a 20-channel system that provides converters to its subscribers, that means one out of twenty channels. As amici Teleprompter, *et al.* note (Br. 19 n.76), the newer cable systems generally do provide converters to their subscribers. For systems that do not provide converters, the rules require the reservation of one out of 12 channels.

[4]The access rules do not curtail the cable operator's discretion to select among available programming and to decide which of those programs it will offer to its subscribers (in contrast, for example, to the signal carriage rules, which prohibit or restrict the transmission of certain signals and which the courts have correctly upheld; see *Midwest Video I, supra*, 406 U.S. at 659 n.17). Rather, they at most impose an economic cost on the operator's decision to provide additional programming. If the requirement that one channel be reserved for access would otherwise prevent an operator from presenting programming that he would like to, he is free to add an additional activated channel to his system to present that programming.

b. The second reason respondent advances in support of its contention that the access rules are beyond the Commission's statutory jurisdiction is that the access rules impose a common carriage obligation on cable systems allegedly in contravention of Section 3(h) of the Communications Act, 47 U.S.C. 153(h), which provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier" (Resp. Br. 34-41). That contention is incorrect for two reasons.

First, the rules under review here do not convert cable systems into common carriers within the meaning of the Act. At most they can be viewed as requiring cable systems to permit a small portion of their facilities to be used for purposes analogous to common carriage. But the rules do not subject cable operators to common carriage regulation under Title II of the Act, which would include tariff filing, rate regulation, and full dedication of facilities to common carriage. Under these

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Furthermore, although respondent argues that cable operators, in selecting among all available programs, exercise journalistic functions comparable to those of broadcasters (see Resp. Br. 29-34), this Court rejected a similar contention, with respect to retransmission of broadcast programming, in *Teleprompter Corp.* v. *CBS*, 415 U.S. 394, 409-410 (1974). There, in holding that the retransmission of distant broadcast signals by cable systems was not a copyright infringement, the Court rejected the argument that a cable operator's exercise of "choice and selection among alternative sources * * * brings it within the scope of the broadcaster function" (415 U.S. at 409), and it accepted the argument of cable operators that "[e]ven in exercising its limited freedom to choose among various broadcasting stations, a CATV operator simply cannot be viewed as 'selecting,' 'procuring,' or 'propagating' broadcast signals as those terms were used in [*Fortnightly Corp.* v. *United Artists Television*, 392 U.S. 390 (1968)]." 415 U.S. at 410.

rules, cable systems will function largely as before, and the overwhelming portion of the services provided to subscribers will be those chosen by the operator. Thus, even if Section 3(h) were applicable to cable television, the rules would not "dee[m]" cable operators to be common carriers in violation of that section.[5]

Second, the provision in Section 3(h) that broadcasters shall not be deemed common carriers is, in any event, not a limitation on the Commission's jurisdiction over cable television. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), established that the Commission's

[5]As one court has noted, the purpose and meaning of the "common carrier" definition in Section 3(h) is not entirely clear. *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F. 2d 630, 640-642 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976). The principal purpose of the provision that broadcasters shall not be deemed common carriers appears to have been Congress' desire that broadcasting should be a field of free competition, and thus that broadcasters should not be subject to the extensive controls, including rate regulation, that Title II of the Act imposes on common communciations carriers. See *United States* v. *Radio Corp. of America*, 358 U.S. 334, 349 (1959); *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940). That is not to say, however, that Section 3(h) was intended to prohibit the Commission from imposing any requirement on broadcasters, not entailing regulation under Title II, that could be analogized to the function of a common carrier. As we noted in our opening brief (pages 25-26, 29 n.24), the Commission and the Act have imposed certain access requirements on broadcasters and cable operators that could be analogized to a common carrier function—for example, the personal attack rule, requiring stations to furnish access to a person attacked during a broadcast; 47 U.S.C. (Supp. V) 312(a)(7), requiring broadcasters to provide time for candidates for federal office; and the signal carriage rules that require cable systems to carry, upon request, the broadcast signals of local broadcasters. Indeed, in *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973), this Court recognized the limitations imposed by Section 3(h) (412 U.S. at 108-109), but also noted that the Commission "may devise some kind of limited right of access [pertaining to broadcasters] that is both practical and desirable" (*id.* at 131), and specifically noted the Commission's proposed access rules for cable television (*ibid.*).

jurisdiction over cable television extends at least to prescribing rules that are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Midwest Video I* further explained that the concept of "reasonably ancillary" jurisdiction included rules requiring CATV affirmatively to " 'further the achievement of long-established regulatory goals in the field of television broadcasting * * *' " (406 U.S. at 667-669, quoting from *First Report and Order in Docket 18397*, 20 F.C.C. 2d 201, 202 (1969)). Nothing in the decisions in *Southwestern Cable* or *Midwest Video I*, however, suggests that the Commission's statutory authority to promote those goals may be exercised only by means that are appropriate or permitted for the regulation of broadcasters; nor would such a holding make sense.

While there are similarities between cable television and television broadcasting, there are also obvious and significant differences between their functions and capacities. Accordingly, a regulation which may be reasonable as applied to one might be quite unreasonable as applied to the other. Respondent acknowledges (Br. 40) that "regulatory methods not suitable * * * for broadcasting might be deemed valid with respect to cable television * * * " and it may be presumed that Congress, when it enacted the Communications Act, was also aware that the reasonableness of particular regulatory methods would depend on the characteristics of the particular communications medium to which they were applied. There is thus no reason to assume that when Congress enacted a provision expressly limiting the means by which the Commission would regulate "a person engaged in radio broadcasting," it intended the same limitation to apply to the regulation of other forms of electronic communication by wire or radio. To the contrary, as this Court stated soon after the Act was enacted (*FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)),

"[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."

2. Respondent also contends that the access rules violate the First Amendment rights of cable operators (Br. 47-55). Like the court of appeals, respondent relies primarily on *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), and argues that cable television systems are indistinguishable from newspapers for purposes of the First Amendment. We have discussed at some length in our opening brief (pages 36-49) the significant differences between the rules involved here and the statute invalidated in *Miami Herald* and between cable systems and newspapers and other print media. We rely primarily on that discussion and only emphasize here two significant distinctions that respondent has overlooked or misapprehended.

First, the barriers facing someone who would communicate to the public by newspaper are primarily economic. The barriers facing someone who would communicate by cable television are not, as respondent contends (Br. 50-52), merely economic; the necessary placement of cables over and under the public streets entails substantial physical constraints and uses of public property that are characteristic of public utilities and other natural monopolies. Indeed, those considerations have been held to justify state and local franchising and regulation of cable systems as public utilities (see *TV Pix, Inc.* v. *Taylor*, 304 F. Supp. 459 (D. Nev. 1968), aff'd, 396 U.S. 556 (1970)), and they can prevent some persons who might be willing and economically able to do so from constructing and operating their own cable television systems.

A second and related distinction between cable television systems and newspapers or other print media concerns the availability of effective alternative means of communication. Persons and groups denied access to a newspaper or magazine have reasonably effective and relatively inexpensive alternatives for communicating their views in print; for example, by direct mailing or dissemination of handbills. In contrast, there is no practical way to engage in cablecasting without access to a cable system. Respondent, like the court of appeals, overlooks those significant distinctions when it claims that cable operators are no different from newspapers for First Amendment purposes.

3. Respondent also claims (Br. 55-64) that the access rules constitute a taking of property without just compensation. That contention is incorrect.

In *Penn Central Transportation Co.* v. *New York City*, No. 77-444 (June 26, 1978), this Court noted that drawing the line between regulation and a compensable taking has often "proved to be a problem of considerable difficulty" (slip op. 17). Although the general purpose of the Just Compensation Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)), this Court "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons." *Penn Central, supra*, slip op. 17. The Court identified several factors having particular significance (*id.* at 18):

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment

> backed expectations are of course relevant considerations. See *Goldblatt* v. *Hempstead*, [369 U.S. 590, 594 (1962)]. So too is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by Government, see, *e.g.*, *Causby* v. *United States*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

In this case those factors indicate that the limited burdens imposed by the access regulations are not ones that justice and fairness require the public as a whole to bear, but rather constitute reasonable adjustments of "the benefits and burdens of economic life to promote the common good."

First, the governmental action in this case cannot "be characterized as a physical invasion by Government." Rather it is simply part of the Commission's regulation of an industry having many of the characteristics of an interstate public utility. The Commission's "comprehensive mandate" and "expansive powers" to regulate that industry are well established. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943); *Southwestern Cable*, *supra*, 392 U.S. at 173. It is also well established that the states and the federal government have the constitutional power to restrict the profits of such industries to a reasonable rate of return without offending the Just Compensation Clause. See, *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 768-770 (1968). Although the Commission does not regulate the rates of cable operators—and indeed has declared that the states are preempted from regulating the rates for pay cable services[6]—there is no claim that the access rules will

[6] *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F. 2d 765 (2d Cir. 1978), petitions for cert. pending, Nos. 77-1835 and 77-1845.

prevent a reasonable rate of return. The fact that an economic burden, which is imposed on an industry that is constitutionally subject to regulation of its profits, does not deprive it of a reasonable rate of return supports our submission that the regulation here is not a compensable taking. Rather it is a reasonable condition imposed on entities that have chosen to provide a public service that is properly subject to governmental regulation.[7]

Second, the economic impact of the rules is minimal, and far less than that of other governmental actions held by this Court not to constitute compensable takings. See *Penn Central*, *supra*, and cases cited at slip op. 25. The principal costs associated with the rules that were initially

[7] Although most taking claims arise in the context of restrictions on the use of property, the factors identified in *Penn Central* are also relevant in determining whether regulations imposing affirmative duties with respect to the use of property constitute compensable taking. See, *e.g.*, *Atchison, T. & S.F.R. Co.* v. *Public Utilities Commission*, 346 U.S. 346 (1953) (requirement that a railroad share the cost of constructing a motor vehicle underpass held not to be a taking). The access rules may also be analogized to requirements that have been imposed on real estate developers to set aside portions of their property for roads of a certain size, parks or recreational facilities for the public, which have generally been upheld against taking challenges. See, *e.g.*, *Associated Home Builders* v. *City of Walnut Creek*, 4 Cal. Rptr. 3d 633, 484 P. 2d 606 (1971); *Jenad, Inc.* v. *Village of Scarsdale*, 18 N.Y. 2d 78, 218 N.E. 2d 673 (1976).

Respondent's reliance (Br. 56-57) on *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, 594 (1926), is misplaced. There the Court invalidated a state law requiring private contract motor carriers to operate as common carriers, purportedly as a condition of their right to use the highway. Whether or not *Frost* remains good law (see *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66, 82 n.3 (1954) (Frankfurter, J., concurring)), the statute involved there is wholly different from the rules under review here. First, an individual private contract motor carrier does not have the characteristics of a public utility. Furthermore, the statute in *Frost* required full dedication of the carrier's business to common carriage, in contrast to the limited access obligation imposed by the Commission's rules.

promulgated in 1972 arose from the requirement that all systems in the top 100 markets provide twenty activated channels by March 31, 1977, and designate four of those channels for access uses. Those rules would have required many systems to engage in expensive rebuilding and to provide converters to their subscribers. In the *1976 Order*, the Commission largely eliminated those costs by extending the deadline for most systems to 1986, by permitting operators to combine access uses on fewer than four channels, and by eliminating any requirement that systems provide converters (see App. 131-141, 148-161). Thus the principal remaining costs associated with the rules promulgated in the *1976 Order* are, first, the marginal cost of maintaining and transmitting at least one channel of access programming, and, second, the opportunity cost of foregoing more lucrative uses of that channel (or of activating an additional channel for those more lucrative uses). The first cost is insignificant, and respondent does not contend otherwise. The second is necessarily speculative; for example, respondent acknowledges that its systems are not presently operating at their 12-channel capacity, though it alleges that they soon will be (Resp. Br. 18-19 n.61). But, in any event, that opportunity cost is analogous to—and far smaller than—the opportunity cost of the landmark preservation that this Court in *Penn Central* held not to constitute a taking.

Third, the rules do not significantly interfere with investment backed expectations. As noted, respondent does not contend that the rules will prevent it from making a reasonable return on its investment. And it is significant in this respect that the rules under review replaced the mandatory origination rule upheld in *Midwest Video I*, which the Commission repealed in 1974 on the ground, urged by cable operators, that it was more economically burdensome than the access rules. *Report*

and Order in Docket 19988, 49 F.C.C. 2d 1090, 1099-1100, 1104-1106 (1974).[8] Furthermore, while the requirement that at least one channel be available for access to some degree curtails cable operators' rights with respect to a small portion of their property, it does not significantly interfere with their "primary expectation concerning the use of [that property]" (*Penn Central, supra*, slip op. 30)—namely the right to use their facilities almost entirely for their own purposes and profit.

Finally, it is significant that the rules under review here do not require cable systems to perform a service, or permit the use of their property for a purpose that is unrelated to the function that they have voluntarily undertaken to perform. The reasons given in *Midwest Video I* for rejecting a similar taking challenge by respondent to the mandatory origination rule are equally pertinent here (406 U.S. at 670):

> The Commission is not attempting to compel wire service where there has been no commitment to undertake it. CATV operators to whom the cablecasting rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking.

As we have noted in our opening brief (pages 27-28), the provision of access services is even more closely related

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[8] It is also significant that the Commission has preempted state and local regulation of the rates charged for pay cable services for the purpose of encouraging development of those services. See *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F. 2d 765 (2d Cir. 1978), petitions for cert. pending, Nos. 77-1835 and 77-1845.

than the mandatory origination rule to the services that cable systems have voluntarily undertaken to provide and, contrary to respondent's claim, there is no basis for distinguishing the access rules from the origination rule for purposes of the Just Compensation Clause.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed and the order of the Commission affirmed.

Respectfully submitted.

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